

P A T E N T

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re:	Sean McFerran	Confirmation No.: 7830
Serial No.:	10/667,056	Examiner: Phillip A. Gray
Filing Date:	September 22, 2003	Group Art Unit: 3767
Docket No.:	1001.1708101	Customer No.: 11050
For:	MICROCATHETER WITH SLEEVED GUIDEWIRE PORT	

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

REPLY BRIEF UNDER 37 C.F.R. § 41.41

CERTIFICATE FOR ELECTRONIC TRANSMISSION:

The undersigned hereby certifies that this paper or papers, as described herein, are being electronically transmitted to the U.S. Patent and Trademark Office on this 23rd day of September 2011.

By 
Kathleen L. Boekley

Dear Sir:

Pursuant to 37 C.F.R. § 41.41, Appellant hereby submits this Reply Brief in reply to the Examiner's Answer of August 2, 2011. Permission is hereby granted to charge or credit Deposit Account No. 50-0413 for any errors in fee calculation.

RESPONSE TO ARGUMENT

The following remarks are submitted after carefully reviewing the Examiner's remarks prepared in the Examiner's Answer.

On pages 5-8 of the Examiner's Answer, the Examiner merely repeats the rejections set forth in the Final Office Action dated October 13, 2010. The Examiner has provided additional comments in the Response to Argument section beginning on page 8 of the Examiner's Answer. None of the original rejections or the additional comments provided by the Examiner can be seen to overcome Appellant's position set forth in Appellant's Appeal Brief. For completeness, however, Appellant has elected to provide a brief rebuttal in response to some of the Examiner's additional remarks.

On pages 9 – 10 of the Examiner's Answer, the Examiner appears to assert Pfenninger et al. disclose “an angled slit extending radially through the polymer sheath at an angle such that the slit has a depth that is greater than a thickness of the polymer sheath” as currently claimed. The Examiner asserts, “[i]t is the examiners position that the angled wall portion or cut away portion from sheath 27 would be considered a ‘slit’ since it is a long narrow cut or opening (as defined in appellant’s remarks page 13), since it is a long entry way cut from the sheath to permit entry into the pathway of the sheath.” Appellant respectfully disagrees with the Examiner's interpretation of a slit. As can be seen in Figure 4 of Pfenninger et al., the opening (9) appears to extend over a significant width of the sheath (27). Appellant respectfully asserts that just because the opening (9) of Pfenninger et al. extends along a length of the catheter shaft it is not necessarily a slit. In contrast, Pfenninger et al. describe the opening (9) at column 7, lines 40 – 45, “[t]his cutout shape may be so large and so long that guide wire 8 easily comes out of shaft 1 when threaded into the catheter without requiring devices such as a ramp, etc., in lumen 7 to facilitate the catheter coming out of the shaft.” Appellant respectfully asserts that one of ordinary skill in the art would not equate such as “large” opening with the presently claimed slit.

The Examiner asserts on page 15 of the Examiner's Answer, “Allman teaches that it is known to use a longitudinal angled slit configured to permit guidewire access through the guidewire port while maintaining a substantially fluid tight in use when no guidewire is provided as set forth in paragraphs at column 8 lines 1-46.” The Examiner further asserts on page 16 of the Examiner's Answer, “[t]he fluid tight feature would be an additional obvious modification and advantage in order to insert guidewires to be radially slid into or out of the sheath assembly

in a controlled and fluid tight manner.” Appellant respectfully disagrees. Allman et al. do not appear to teach or suggest the slit 118 provides a substantially fluid tight seal as the Examiner appears to be asserting. The only motivation for such an interpretation appears to be gleaned from the present application, which is improper. MPEP 2142 states, “However, impermissible hindsight must be avoided and the legal conclusion must be reached on the basis of the facts gleaned from the prior art.”

The Examiner appears to further assert that the sheath configuration illustrated in Figure 4C of Allman et al. illustrates a slit having an angle less than 90 degrees. Figure 4C of Allman et al. appears to illustrate a sheath having a portion that overlaps. The Examiner appears to assert that the angle between the ends of the overlap is a slit having an angle less than 90 degrees (see page 18 of the Examiner’s Answer). Appellant respectfully asserts that one of ordinary skill in the art would not equate an overlap with the presently claimed slit. As discussed on page 13 of the Appeal Brief filed on May 9, 2011, Merriam-Webster defines slit as “a long narrow cut or opening” (<http://www.merriam-webster.com/dictionary/slit>, accessed July 2, 2010). The intended meaning of the word slit is further evidenced by the description as well as the figures (see, for example, reference numeral 58 shown in Figure 7). Appellant respectfully asserts the overlap of materials as shown in Figure 4C of Allman et al. does not appear to be a slit.

Conclusion

For the reasons set forth in the Appeal Brief filed May 9, 2011, as well as the reasons set forth herein, the Examiner’s rejections of claims 13, 15-17, and 21-27 under 35 U.S.C. § 103(a) should all be reversed.

Respectfully submitted,

Sean McFerran

By his Attorney,

Date: September 23, 2011

/j. scot wickhem/
J. Scot Wickhem, Reg. No. 41,376
SEAGER, TUFTE & WICKHEM, LLC
1221 Nicollet Avenue, Suite 800
Minneapolis, MN 55403-2420
Telephone: (612) 677-9050
Facsimile: (612) 359-9349